APPEAL NO. 022484
FILED NOVEMBER 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 29, 2002. The hearing officer determined that the decedent's death was the result of a compensable injury sustained on _____; that the decedent was injured in the course and scope of his employment when he was involved in a fatal fall on _____; that the respondent, Ms. H, is the proper legal beneficiary of the decedent, and she is entitled to death benefits; and that the appellant (carrier) is not relieved of liability according to Section 406.032 because of the decedent's horseplay. The carrier appealed all of the above determinations. Ms. H responded, urging affirmance.

DECISION

Affirmed.

The facts in this case are largely undisputed. The decedent was the son of Ms. H and on _____, he was employed as a window installation helper with the employer. On _____, the claimant and his coworkers were installing windows in a hotel that was under construction. Mr. S, who was the installer for whom the decedent was a helper, testified that on _____, he and the decedent had just finished installing a window and they broke for lunch. Mr. S left the room where they had been working and went downstairs to the lunch truck to buy his lunch. The decedent stayed behind to organize supplies and then he was going to go down to buy his lunch from the truck. Shortly thereafter, the decedent decided to climb down the scaffolding rather than taking the stairs or the elevator down. There is some conflict in the evidence but it appears that the decedent jumped out of an unfinished window to the scaffold about a foot away from the window and a board on the scaffold tipped up, the decedent lost his balance, he grabbed for a handrail and it gave way, causing the decedent to fall five stories and land on the ground below. The decedent died as a result of the blunt force injuries he sustained in the fall.

Mr. S testified that he had not seen other employees with the employer use the scaffold to climb down. Mr. A another of the employer's employees also stated that he had not seen any of his coworkers use the scaffold to climb up and down. Both Mr. A and Mr. S testified that the scaffold was used by the employees from another subcontractor that was doing the stucco work in the exterior of the building, that those employees used the scaffold to go up and down, and that many of their coworkers bought their lunch from the lunch truck.

Mr. P, employer's vice president of field operations, testified that it was his understanding that the claimant was not working in the room of the window that he went out of to go down the scaffolding. Mr. P also stated that while he could not specifically

state that the employees had been directed not to climb up and down the scaffold, it was "normal company policy" that the employees would not do so. Finally, Mr. P testified that the employees were not paid during lunch.

The hearing officer determined that the claimant was in the course and scope of his employment at the time of his fall. Initially, we note that under the personal comfort doctrine, as recognized by the Texas Supreme Court in Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), the claimant's action of going down to the lunch truck was not sufficient to remove him from the course and scope of employment. However, a question remains as to whether the activity of going down the scaffold, as opposed to using the elevator or the stairs, was a deviation of such a nature as to constitute a departure from the course and scope of employment. The carrier cites several cases and argues that the claimant's action of jumping out of the window and attempting to climb down the scaffold was a deviation from the course and scope of employment. We cannot agree that the cases cited by the carrier are controlling here. Rather, we believe that the decedent's decision to climb down the scaffold was in the nature of an incidental deviation that was insufficient to remove him from the course and scope of employment at the time of the fall. This outcome is consistent with our decisions in Texas Worker's Compensation Commission Appeal No. 001700, decided September 8, 2000; Texas Worker's Compensation Commission Appeal No. 001821, decided September 19, 2000; Texas Worker's Compensation Commission Appeal No. 002026, decided October 16, 2000; Texas Worker's Compensation Commission Appeal No. 010491, decided April 23, 2001; and Texas Worker's Compensation Commission Appeal No. 012541, decided November 19, 2001.

Much of the carrier's argument focuses on the fact that the claimant violated company safety policy and/or Occupational Safety and Health Administration regulations in his action of attempting to climb down the scaffold. Those arguments seem designed to demonstrate negligence on the part of the decedent, which is of no consequence in the worker's compensation setting, which is one of strict liability.

With respect to the carrier's argument that the claimant was engaged in horseplay at the time of his fall, we note that there is simply no evidence to support this theory. The carrier's attorney argued that the claimant was racing his coworkers down to the lunch truck, but the coworkers who testified at the hearing both stated that they were unaware of any such race taking place.

Lastly, we cannot agree that the great weight of the evidence is contrary to the determination that Ms. H, the decedent's mother, is not a proper death beneficiary under Section 408.182(d) and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 132.6 (Rule 132.6). Ms. H and Ms. M, the decedent's sister, both testified that at the time of his death, Ms. H lived with her son and that he paid the rent ($470.00 per month) and utility bills ($100.00 per month), bought the food ($130.00 per month), and that he gave her $50.00 per week for personal expenses and savings so that she would have some money to send to her other family that still lived in Mexico. Ms. H stated that she made about $70.00 per week selling tamales one day a week and that she could not make

them more than once a week because it was too difficult for her to do so. Ms. H further testified that during part of the year in 2000 two of her other sons lived with her and the decedent and they gave the decedent about $50.00 per week to help with expenses; however, the rest of the money they made was sent to Mexico. That testimony provides sufficient evidentiary support for the hearing officer's determination that at the time of the decedent's death, Ms. H was a dependent parent under Rule 132.2(b) and (c) in that the decedent contributed equal to or greater than 20% of Ms. H's net resources. Nothing in our review of the record demonstrates that the hearing officer's determination that Ms. H was a proper death beneficiary as a dependent parent is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

DONALD GENE SOUTHWELL
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75265.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge